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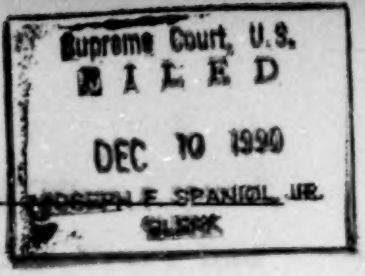

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

LINDA B. DORFMONT,

Petitioner,

vs.

JAMES P. BROWN, Director of Department of Defense, DEFENSE LEGAL SERVICES AGENCY, DIRECTORATE FOR INDUSTRIAL SECURITY CLEARANCE REVIEW, FRANK C. CARLUCCI, Secretary of Defense, UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction to review the administrative decision lifting the Security Clearance of DORFMONT.

2. Whether the District and Ninth Circuit Courts have misinterpreted the recent Supreme Court decision of Department of Navy v. Egan as foreclosing judicial review of security clearance matters, when judicial review was originally permitted in the Supreme Court decision of Greene v. McElroy.

3. Whether the District Court and Court of Appeal failed to recognize DORFMONT'S Proprietary Interest in her employment and her security clearance and her right to remain gainfully employed as afforded to her through the United States Constitution, Fifth Amendment.

4. Whether the District Court has jurisdiction to review Administrative

Decision revoking DORFMONT'S Security Clearance where a federal question is involved.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

LINDA B. DORFMONT, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States District Court, Central District of California, entered in the above-entitled action on September 26, 1988, and affirmed by the United States Court of Appeal for the Ninth Circuit on September 10, 1990.

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed is published and printed in

Appendix A hereto, infra, pages 1-16. The judgment of the United States District Court, Central District of California is unreported and is printed at Appendix A hereto, infra, pages 17-18.

II.

JURISDICTION

The Judgment of the United States District Court, Central District of California, (Appendix A, infra, pages 17-18), was entered on September 26, 1988. Petitioner filed a timely Notice of Appeal to the United States Court of Appeal for the Ninth Circuit. After briefing and oral argument, the Ninth Circuit Court of Appeal published its decision on September 10, 1990. Petitioner has timely filed this Petition for Writ of Certiorari. The jurisdiction of the Supreme Court is invoked under 28

U.S.C. Section 1254(1).

III.

STATUTES INVOLVED

This case involves the Fifth Amendment to the Co..stitution of the United States, which provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime.....; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be

taken for public use, without just compensation."

IV.

STATEMENT OF CASE

A. NATURE OF CASE

DORFMONT brought an action to stay the Order of the DEPARTMENT OF DEFENSE, DEFENSE LEGAL SERVICES AGENCY, DIRECTORATE FOR INDUSTRIAL SECURITY CLEARANCE REVIEW revoking her Security Clearance pendente lite. She also sought a preliminary and permanent injunction enjoining the Respondents from proceeding further against her in the administrative proceedings pursuant to the Order of the Hearing Examiner Jerry Muskrat rendered on November 19, 1986 and November 17, 1987 revoking her current Secret Security Clearance and denying her a Top Secret Security Clearance. She also sought a

judicial determination that the administrative decisions rendered by the Hearing Examiner and affirmed by the DEPARTMENT OF DEFENSE APPEALS BOARD violated procedural and substantive due process based on unconstitutionally vague criteria.

B. COURSE OF PROCEEDINGS

1. Administrative Hearings

On July 24, 1985, the Respondents, DEPARTMENT OF DEFENSE, DEFENSE LEGAL SERVICES AGENCY, DIRECTORATE FOR INDUSTRIAL SECURITY CLEARANCE REVIEW issued their Statement of Reasons for deciding not to grant DORFMONT a Top Secret Security Clearance and denying her current Secret Security Clearance. That decision was based on Criterion I of D.O.D. Directive 5220.6 stating that available information reflects facts, circumstances or conduct of a reckless nature indicating poor

judgment, unreliability or untrustworthiness. The information relied upon by the Respondents was that DORFMONT had provided between approximately June of 1984 and July, 1984 company sensitive defense contract data to Lubemir Peichev, a Bulgarian National, serving a life sentence in the federal prison at Terminal Island, California for his involvement in an attempted hijacking of an airliner for ransom and that DORFMONT had indicated an intention to develop a closer relationship with Mr. Peichev.

On September 8, 1985, DORFMONT executed her Response to the Statement of Reasons denying that the information provided to Mr. Peichev was company sensitive defense contract data or that she ever intended to develop a closer relationship to him. DORFMONT requested a formal hearing and hearings were

conducted on September 9th, 12th, 16th and 22nd, 1986.

On or about November 19, 1986, Hearing Examiner Jerry Muskrat rendered a decision and determination finding that Criterion I, Subparagraphs (a-b) were against DORFMONT and that it was not clearly consistent with the national interest to grant DORFMONT a Top Secret Security Clearance or continue DORFMONT'S current Secret Security Clearance. A copy of that Determination has been attached in Appendix B hereto, infra, pages 1-16, and lodged with the Clerk of the Supreme Court.

On or about November 25, 1986, DORFMONT filed an Appeal of the Hearing Examiner's determination on several grounds. After submission of Briefs by both sides, on September 3, 1987, the DEPARTMENT OF DEFENSE APPEALS BOARD issued its determination finding some

error and remanded the matter back to the Hearing Examiner for reconsideration not inconsistent with the determination. A copy of that Decision has been attached in Appendix B hereto, infra, pages 17-24, and lodged with the Clerk of the Supreme Court.

On November 17, 1987, Hearing Examiner Muskrat rendered his decision on reconsideration again finding against DORFMONT on Paragraph 1 and Subparagraph 1(a) and determined that it was not clearly consistent with the national interest to grant or continue a Security Clearance for DORFMONT. A copy of that decision has been attached in Appendix B, pages 25-40, and lodged with the Clerk of the Supreme Court.

On January 4, 1988, DORFMONT filed a Notice of Appeal of the Determination on Reconsideration. Again, both sides submitted Briefs and, on July

22, 1988, the Appeals Board issued its determination affirming the decision of the Hearing Examiner Muskrat stating that, "This Board has no authority to reverse the decisions of the Examiners." Respondents also informed DORFMONT that the determination was the final decision and there was no further administrative remedy. A copy of that decision has been attached in Appendix B, pages 41-49, and lodged with the Clerk of the Supreme Court.

2. Judicial Proceedings

On August 29, 1988, DORFMONT filed her Complaint for Relief in the United States District Court, for the Central District of California. The Complaint, in essence, challenged the decision of the Respondents stating that they violated DORFMONT'S Constitutional rights to substantive due process of law and that there were inadequate guidelines

failing to assure a reasonable nexus or relationship between the allegations that support the denial of DORFMONT'S Security Clearance and the criteria as set forth in Directive 5220.6 and a reasonable nexus between that criteria and the policy objectives of the United States to protect itself against hostile or destructive activities by preventing unauthorized disclosure of classified information relating to National Security. DORFMONT also challenged the determinations of the Hearing Examiner as being contrary to the evidence and inconsistent with the determination and Order for Remand by the Appeal Board, and on various other grounds indicating both substantive and procedural violations of due process of law as afforded to DORFMONT under the United States Constitution. DORFMONT also challenged the decision of Hearing Judge Muskrat for

engaging in inherent bias and partiality against her and for utilizing vague, ambiguous and overbroad guidelines. She prayed for an Order Staying the Order of the DEPARTMENT OF DEFENSE, DEFENSE LEGAL SERVICES AGENCY, DIRECTORATE FOR INDUSTRIAL SECURITY CLEARANCE REVIEW from revoking her current Security Clearance and the issuance of preliminary and permanent injunctions against further proceeding in revoking her current Security Clearance and denying her a Top Secret Security Clearance.

Co-extensively with the filing of her Complaint, DORFMONT filed for an Ex Parte Application for an Order Staying the administrative decision revoking her current Security Clearance.

The Court, on August 29, 1988, denied the Stay, but set the matter for an Order to Show Cause hearing as to why Respondents should not be required to

stay the administrative determinations revoking DORFMONT'S current Security Clearance pending the adjudication of the cause. The hearing was scheduled for September 20, 1988.

C. DISPOSITION OF CASE

On September 20, 1988, the matter regarding the preliminary injunction was heard before Honorable William P. Gray, Judge of the United States District Court, Central District of California. After hearing argument from both sides, the Court ordered that the District Court does not have jurisdiction to review the lifting of the Security Clearance of DORFMONT and that the Court refrains from making such review to determine whether there had been an abuse of discretion, relying upon Department of Navy vs. Egan, 108 S.Ct. 818, and Hill vs. Department of Air Force, 844 F.2d 1407 (10th Cir. 1988).

The Court further noted that, accordingly, the action would be dismissed for want of subject matter jurisdiction. The Judgment was filed on September 22, 1988 and was entered on September 26, 1988. On October 20, 1988, DORFMONT filed her Notice of Appeal to that Judgment. The United States Court of Appeal for the Ninth Circuit affirmed the lower Court's decision on September 10, 1990.

D. STATEMENT OF FACTS

DORFMONT has held a Security Clearance validly issued from the DEPARTMENT OF DEFENSE for eighteen (18) years while employed at Hughes Aircraft Company, in El Segundo, California. On July 24, 1985, the DEPARTMENT OF DEFENSE, DEFENSE LEGAL SERVICES AGENCY transmitted to DORFMONT a Statement of Reasons stating that it was unable to find that it was clearly consistent with national

interest to grant or continue her access to any classified information and recommended that her case be submitted to an Examiner for determination whether to deny or revoke her present Security Clearance.

On or about September 9, 1985, DORFMONT submitted her Response to Statement of Reasons denying that she provided company sensitive defense contract data to the federal prisoner or that she intended to develop a closer relationship to that prisoner in the future. On October 8, 1985, she requested a formal hearing.

During the course of the hearings conducted on September 9th, 12th, 16th and 22nd, 1986, witnesses testified for the DEPARTMENT OF DEFENSE as well as for DORFMONT. One of the central issues at trial dealt with the sensitivity of the documents allegedly

transferred to the federal prisoner. Testimony of DORFMONT and DORFMONT'S immediate supervisor, Robert Smith, Assistant Manager at Hughes Radar Systems, established that the material sent to the federal prisoner was of no intelligence value, was not company sensitive defense contract data or of any value to Hughes Aircraft Company's competitors. The DEPARTMENT OF DEFENSE called Robert Parsons as a witness. Mr. Parsons was the manager of the Advanced Programs Division of the Radar Systems Group and DORFMONT'S second-in-line supervisor. He testified that the data transmitted to the federal prisoner was not classified or marked company sensitive defense contract data, but that it "could be of intelligence value and could be of value to our (Hughes) competitors." Both Mr. Smith and DORFMONT testified that they were more

familiar with the "Predict" Project than Mr. Parsons was.

DORFMONT was assigned to the Advanced Programs Division of Radar Systems Group to design an access system to the Predict Project. The Predict Project is a system to take parts list and form a prediction of the mean time between failure of the completed system using the parts list by a computerized look-up and calculation of probable failure rates of each individual part. This system is integrated with a military standard or military handbook called MIL Standard 217, which is a reliability prediction. After predicting the reliability or the probability of failure of each individual part, then all the probabilities would be placed together in mathematical equations to predict the overall reliability or the overall probability of failure.

During the administrative hearing, evidence was received establishing the following facts: DORFMONT commenced working in the Advanced Programs Division of Radar Systems Group in April of 1984. Her major assignment was to design an access system to the Predict Program. At the commencement of her working on the project, she determined that she must use the E.D.S.G. (Hughes Division) strip file, a coded parts list and reformat the Predict format with Predict codes. The Predict Program ran both on the IBM and Hewlett Packard, HP-3000 computers in Fullerton. It was therefore necessary that DORFMONT convert to a common language that both computers would understand. The common language between IBM and HP-3000 computers was Fortran and very few programmers at Hughes Aircraft Company were experienced in Fortran and

also available to do the programming for DORFMONT'S needs. During a six (6) week period in April and May of 1984, DORFMONT attempted to locate programmers for the conversion process. She contacted at least sixteen (16) programmers at Hughes Aircraft Company, but not one of them would assist her in the conversion because of other commitments and projects they were working on. DORFMONT informed her supervisor that she was having an extremely difficult time locating knowledgeable and available programmers. Mr. Smith, her supervisor, was aware of the difficulty locating programmers. It was permissible for employees of Hughes Aircraft Company to seek outside assistance concerning work on a project, especially for programming needs. DORFMONT was given access to go outside Hughes Aircraft Company to obtain assistance on the Predict Project. She

was even given authority to go outside and obtain assistance on the Project after the alleged incident that occurred in July of 1984; the subject of the administrative hearing. During her assignment to the Predict Project, she was under production time schedules and was constantly informed that she must meet her assignment deadlines. Because of time schedules and the unavailability of Hughes Aircraft programmers, DORFMONT decided to go outside Hughes Aircraft to locate a Fortran computer programmer.

DORFMONT was a member of the Space Toastmaster Club which interacts with other area Toastmaster Clubs. In October, 1983 she met Lubomir Peichev at a meeting with a Terminal Island Federal Correction Institution's Prison Toastmaster Club. She met Mr. Peichev on occasion thereafter and became aware that he was serving a life sentence for

conviction on charges of conspiracy to hijack an airplane. Mr. Peichev was a Bulgarian refugee. He was granted political asylum in Vienna, Austria and later emigrated to the United States. During his prison term he received a Bachelor of Science degree along with other degrees. After receiving his degrees and, while in prison, he worked for the Department of Agriculture utilizing his computer education. DORFMONT was informed by Mr. Peichev that he knew Fortran. MS. DORFMONT stated that Mr. Peichev was her last choice, but seeing no alternative, she mailed the following material to him: a) Culprit Language - a small pocket manual used to aid people dealing with the Culprit language; b) Predict User Manual - which described the input file to Predict; c) Sample File - file using dummy (unrealistic) assembly numbers and backup

table; included in the file was a parts list; d) Strip Lib Data. On or about July 25, 1984, Mr. Peichev received the first mailing and commenced doing the conversion of Predict to the Fortran language. DORFMONT estimated that Mr. Peichev completed forty (40) percent of the project within two (2) months without financial consideration or any consideration whatsoever. Mr. Peichev received the July 25th, 1984 mailing, but the July 30th, 1984 mailing of the same documents were intercepted by prison authorities. The FBI, relying on the statements made by Hughes personnel, declined to investigate the incident. The entire incident was handled in-house at Hughes Aircraft Company. The subject content of the material was useless without an assembly list. Without an assembly list, the parts lists were the equivalent to shopping lists of

electronic parts that could be purchased from any electronics store. No evidence was received during the hearing to substantiate that DORFMONT intended to develop a close relationship to Mr. Peichev.

The Respondents utilized DOD Directive 5220.6 for guidance in conducting administrative hearings on Security Clearance review matters. Directive 5220.6 was enacted by an Executive Order made on February 20, 1960. There have been subsequent amendments to that order. Executive Order 10865 specifies that it is a fundamental principle of the government to protect the interest of individuals against unreasonable or unwarranted encroachments and that the provisions and procedures prescribed by this Order are necessary to assure the preservation of the integrity of the classified defense

information, to protect national interests, and to recognize the interest of individuals affected thereby and to provide maximum possible safeguards to protect such interest.

The Under Secretary of Defense for Policy is the designated authority to issue investigative policies for the program and to issue changes to the adjudication policy and is responsible for overall policy guidance and oversight. Directive 5220.6 specifies the procedures for Industrial Security Clearance Review. The underlying policy for such procedures is recited in Paragraph F(3) of 5220.6 of the Directive.

The Directive sets forth the determinant factors in each personnel security determination at paragraph F(4) of the Directive.

The Directive lists

approximately 16 different Criteria for determining eligibility for a clearance, including Criterion I; the criterion on which DORFMONT'S Security Clearance was adjudicated. Criterion I specifically states "acts of omission or commission that indicate poor judgment, unreliability or untrustworthiness."

The Directive, as promulgated and amended over the years, is now inconsistent with the Executive Order as initially signed by then President Dwight D. Eisenhower, in that the provisions and procedures utilized do not provide the maximum possible safeguards to protect the individual's interest in possessing a Security Clearance.

On or about June 25, 1985, CASPAR W. WEINBERGER, former Secretary of Defense, established the DOD Security Review Commission. The Commission was formed to examine relevant DOD policies

and procedures, including but not limited to Security Clearance review hearings. After several months of investigation, the DOD Security Review Commission, on November 19, 1985, submitted a report to the Secretary of Defense entitled "Keeping the Nation's Secrets", through a letter of transmittal, by Richard G. Stilwell, Chairman of said Commission. On page 10 of that report in the section entitled "Executive Summary - Key Findings and Recommendations", the Commission found that the adjudication process in which Security Clearance determinations are rendered must be improved. The Commission essentially found:

> "Although adjudication is the final step in determining eligibility for

access to classified information, such decisions are made on the basis of vague criteria, and many adjudicators are inadequately trained. As a result, it is possible to reach different adjudicative determinations in applying the same criteria..."

The Commission recommended that necessary research and other action be undertaken to develop more precise and effective adjudicative standards. On Page 36 of the Commission's Report, the Commission recommended that the criteria be revised which governs the adjudication of Security Clearance hearings to provide

far more specificity than is currently the case, to the end of more uniform and consistent Security Clearance determinations. The Commission's report substantiates DORFMONT'S claim and contention that the adjudication process for a Security Clearance review matter results in a violation of substantive due process in that such criteria is arbitrary, vague and overbroad.

DORFMONT, on or about November 25, 1986, filed an appeal of Administrative Law Judge's determination. On appeal, Plaintiff challenged the determination of Hearing Examiner Jerry Muskrat on several grounds: A) The Determination of Jerry Muskrat was contrary to the evidence submitted; B) The Determination was contrary to Directive F(3); C) Criterion I has little or no relationship to suggest that DORFMONT might fail to safeguard

classified information or might disclose classified information to unauthorized person deliberately or inadvertently. The Determination was arbitrary when there was no nexus between the Criterion and national interest to be protected; D) Hearing Examiner committed an abuse of discretion in excluding evidence that would show the data transmitted to federal prisoner was not company sensitive defense contract data or classified; E) Criterion I specified acts in the plural, not singular; F) Hearing Examiner abused his discretion in denying DORFMONT'S Motion to Dismiss when Department counsel failed to establish a prima facie case under Directive 5220.6.

On September 3, 1987, Department of Defense Appeal Board filed its Determination finding some error and remanding the case to the Hearing Examiner for reconsideration not

inconsistent with that Determination. On November 17, 1987, Hearing Examiner Muskrat rendered his Reconsideration pursuant to Remand. The Determination on Reconsideration found against DORFMONT, a second time, on Paragraph 1 and Subparagraph 1a and determined that it was not clearly consistent with the national interest to grant or continue a Security Clearance for DORFMONT.

On January 4, 1988, DORFMONT filed a Notice of Appeal to the Reconsideration.

On February 10, 1988, DORFMONT filed her Opening Brief on Reconsideration. In addition to the grounds for appeal as specified above, DORFMONT also alleged grounds for appeal to include: A) The Determination of Hearing Examiner on Reconsideration pursuant to Remand was inconsistent with the Appeal Board Determination and Order

for Remand; B) Hearing Examiner's findings and conclusions are in contravention of the Determination of Appeal Board; C) Hearing Examiner erred in not rendering a determination consistent with the Determination and Order for Remand by Appeal Board.

On July 22, 1988, the Appeal Board issued its determination affirming the Determination of Muskrat stating that, "This Board has no authority to reverse the decisions of the examiners." By letter, AGENCY informed DORFMONT that the determination was the final decision and there was no further administrative remedy. DORFMONT exhausted all administrative remedies prior to filing her complaint. DORFMONT fully complied with all procedural requirements of AGENCY, including an appeal to the DIRECTOR thereof, Respondent herein, and no further right of review or appeal or

other remedy was available to DORFMONT before such agency.

E. STATEMENT OF SUBJECT MATTER JURISDICTION

The jurisdiction of this action is conferred on the District Court by 28 U.S.C. Section 1346, commonly referred to as the Tucker Act, under 28 U.S.C. Section 1331 and under 5 U.S.C. Section 702.

The Judgment of Dismissal for Want of Subject Matter Jurisdiction on September 26, 1988 constitutes a final order disposing of the action as to all parties and to all claims. On October 20, 1988, DORFMONT filed her Notice of Appeal.

V.

REASONS FOR GRANTING WRIT

DORFMONT claims that the Court does have subject matter jurisdiction to review the lifting of her Security

Clearance in that it constituted an abuse of discretion and was clearly erroneous for the Court to refrain in making a review to determine whether there was an abuse of discretion by the administrative agency. It was also clearly erroneous and an abuse of discretion for the Court not to conduct a de novo hearing or otherwise review the administrative decisions rendered on the DORFMONT matter to determine if there were violations of procedural and substantive due process of law. DORFMONT claims that she has a proprietary interest in her employment and her Security Clearance and that she has a right to remain gainfully employed as afforded to her through the United States Constitution. The loss of her security resulted in the loss of her employment of 18 years. The dismissal of the action has denied her judicial review of determinations rendered by

administrative agencies that violate substantive and procedural due process.

1. THE DISTRICT COURT HAD JURISDICTION TO REVIEW THE ADMINISTRATIVE DECISION LIFTING THE SECURITY CLEARANCE OF DORFMONT.

The District Court's ruling and affirmed by the Ninth Circuit that the District Court did not have jurisdiction to review the administrative decision lifting the Security Clearance of DORFMONT was clearly erroneous and inconsistent with Supreme Court decisions. There are numerous cases in which the Court has acknowledged jurisdiction to review administrative decisions concerning Security Clearances. Greene vs. McElroy, 360 U.S. 474, (1959). Adams vs. Laird (1969), 420 F.2d 230. Gayer vs. Schlesinger, 490 F.2d 740 (1973). In Gayer, the Court found that

the District Court had jurisdiction to set aside the revocation of a Security Clearance. The Court agreed with the lower Court that the "shocking array of questions" exceeded the authority of the Federal Agency and Department, under their basic Charter, Executive Order No. 10865, and violated the Applicant's First Amendment rights of privacy, which states:

> "It is fundamental principle of our government to protect the interests of individuals against unreasonable or unwarranted encroachments."

In a similar case, the Court found that it had jurisdiction over the parties and the subject matter to review a suspension of a Security Clearance when

Applicant refused to provide information of his homosexual lifestyle, which the Court determined was a clear violation of Applicant's First Amendment rights. See Gayer vs. Laird (1971), 332 F.Supp. 169, 171. The Court found in Marks vs. Schlesinger (1974), 384 F.Supp. 1373, 1376, there must be a rational relationship between the conduct found to exist and the actions of the administrative body.

In this case, DORFMONT has alleged claims for violation of substantive and procedural due process violations, challenging vague guidelines as determined by the Security Clearance Review Commission. The vague criteria utilized has directly impacted upon Petitioner's Security Clearance, her employment and her right to remain gainfully employed by the Hearing Examiner expressing bias, (stating

DORFMONT was a perjurious witness) and making it a part of the determination when there was no evidence to support such claim. On the face of the Complaint, not controverted by any evidence, DORFMONT has established the necessary elements to invoke the Court's jurisdiction; namely, the Federal Agency and Department have gone beyond the scope and exceeded their authority under Executive Order 10865 and utilized such vague guidelines which have eroded away constitutionally protected areas of substantive and procedural due process. The administrative determinations have resulted in an abuse of discretion and a clear violation of the Constitutional rights of DORFMONT. It was error for the Court to dismiss the action for want of jurisdiction.

Judicial review of administrative agency's findings of facts

have been permitted under the Administrative Procedures Act. The three standards that govern judicial review of those administrative findings of facts are when the agency's findings and conclusions are (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (B) contrary to Constitutional right, power, privilege or immunity; (C) in excess of statutory jurisdiction of authority, or limitations short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing Court. See 5 U.S.C. Section 706; Bowman Transportation vs. Ark-Best Freight Systems (1974), 419 U.S. 281, 284.

It has been determined that

when an action is not based upon all the relevant factors which should have been considered, there is no rational basis for sustaining the agency decision. Connor vs. Andrus (1978), 453 F.Supp. 1037. If there is no rational basis for sustaining the agency's decision, that decision is deemed arbitrary and capricious. Although the Court is not empowered to substitute its judgment for that of the agency, the reviewing Court must consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment. National Resources Defense Council, Inc. vs. Securities and Exchange Commission (1979), 606 F.2d 1031. Judicial review is highly appropriate in applying arbitrary and capricious standard when agency's decision display a history of ad hoc and inconsistent judgments on a

particular question, or have arrived at identical results after judicial remand for explanation of reasons, or has departed from its consistent and long-standing precedence or policies. See National Resources Defense Council, Inc., supra.

In the DORFMONT case, there are issues for judicial review of an administrative determination revoking DORFMONT'S Security Clearance and denying her access to a Top Secret Security Clearance.

D.O.D. Directive 5220.6 is largely created from Executive Order No. 10865. Executive Order No. 10865 was a response to the decision in Greene vs. McElroy, supra, which found procedural and substantive violations of due process in the earlier Security Clearance program. There was an overhaul of the Security Clearance Review process which

was referred to in Adams vs. Laird, supra.

The Court in Adams vs. Laird, though articulating the change made to the Security Clearance Review process did not have before it the DOD Security Review Commission Report, entitled "Keeping the Nation's Secrets", which would have lent a lot of credence to the dissenting opinion of Circuit Judge J. Skelly Wright in Adam vs. Laird.

The Court in Adams vs. Laird chose not to inquire into the standards employed by the Department of Defense in its adjudication of security clearance matters. The Court in Laird specifically stated: "The prescription of the Standard to be observed in this field is for the President to make in the discharge of his executive functions. We do not second guess that choice unless the Constitution commands us to do so." The Industrial

Personnel Security Clearance Program of the Department of Defense has been Presidentially delegated to the Secretary of Defense. On June 25, 1985, then Honorable Caspar W. Weinberger, Secretary of Defense, established the DOD Security Review Commission to examine DOD policies and procedures. On November 19, 1985, the Commission submitted its report to the Secretary of Defense, a document entitled "Keeping the Nation's Secrets". After several months of investigation, the Commission determined and found that the adjudication process in which security clearance determinations are rendered must be improved. It found that the decisions are made on the basis of vague criteria and many adjudicators are inadequately trained. As a result it is possible to reach two different conclusions using the same standard. The Commission recommended that more precise

and effective adjudicative standards be developed.

The Commission after its investigation into the adjudication phase of the Security Clearance Program made the following recommendation:

> "Revise the criteria which governed the adjudication of security clearances to provide far more specificity than is currently the case, to the end of more uniform and consistent security clearance determinations."

Since the Report was submitted to the Secretary of Defense on November 19, 1985 and the determination made by Hearing Examiner Muskrat utilized DOD

Directive 5220.6, as currently in effect with the last revision dated August 12, 1985, it is most evidently clear that the very Commission's denigration of the practices and standards in effect cover Directive 5220.6, as revised August 12, 1985. This was the Directive in effect for the hearing on the DORFMONT matter. If the Commission created by the Secretary of Defense determined that the criteria and adjudication standards are not specific enough, then the report, its findings and its recommendations can be characterized as an admission that the whole review process is fraught with Due Process problems. The ultimate action required to be performed is carried out by a designated Presidentially Appointed Official of the Department. In this case the Deputy Secretary of Defense was this designee. 32 C.F.R. Section 155.7 (f)(5). See also Gayer vs. Schlesinger,

490 F.2d 740, 744 (1973).

Judicial review is warranted when there is a presence of procedural unfairness. Although the agency's construction of its directives and regulations receives deference on review, it is nonetheless a question of law as to the agency's judgment in unfairness without the judiciary feeling that it is invading the agency's own expertise or its rights to make discretionary choices. The appearance of unfairness transcends notions of agency expertise, and the details of the subject matter; it can influence the Court to reverse. Delta Airlines vs. C.A.B., 561 F.2d 293, 306-312 (1977). The court has stated in Zuber vs. Allen (1969) 396 U.S. 168, 192-193, while the court has announced that it will "accord great weight to a departmental construction of its own enabling legislation, especially a

contemporaneous construction, (citations omitted) it is only one input in the interpretational equation... The Court may not, however, abdicate its ultimate responsibility to construe the language employed by Congress. Those props that served to support a disputable administrative construction are be absent here."

In a case quite similar to the DORFMONT action, the Court in Marozsan vs. United States (7th Cir. 1988), 852 F.2d 1469, stated that the Court was empowered to conduct a judicial review of an administrative agency's decision when such agency determination has violated a party's Constitutional rights by employing arbitrary methods of determining fringe benefit claims to grant. The Court found that the District Court should assume federal question jurisdiction over Marozsan's due process

claims under 28 U.S.C. Section 1331. In Marozsan, the Plaintiff filed a Complaint alleging that the Veterans Administration violated his Constitutional rights to due process employing an arbitrary quota system and processing claims. Marozsan injured his back in 1949 while on active duty in the Navy, the Board of Veteran's Appeals rated Marozsan twenty (20%) percent disabled. Marozsan filed petitions to increase the ratings, but they were refused by the Board. The Court in Marozsan reiterated the holding of Winslow vs. Walters, 815 F.2d 1114, 1117, finding that Federal Courts are not divested of jurisdiction over suits challenging the Constitutionality of the VA's procedures under the due process clause of the Fifth Amendment. The legislative history of 38 U.S.C. Section 211(a) shows no congressional intention to bar judicial review of Constitutional

questions.

The Court found in Winslow that a constitutional challenge of due process of the VA pension program presents a question of law that arises under the Constitution. The requirements of due process are not within the VA's particular expertise. The Court reversed the District Court's decision to the extent the Court had no jurisdiction over the claim stating that Section 211(a) does not bar review of Winslow's due process claims.

Similarly, because Courts can review VA action for compliance with non-VA statutes, it would be anomalous to suggest that the VA's actions in violation of the Constitution are immune from scrutiny. See Ralphs v. Bell, 569 F2d 607, 620 (1977).

Complaint of DORFMONT raises procedural and substantive due process

violations. Those violations stem from vague and arbitrary criteria employed by said agency, inherent bias on the part of the Hearing Examiner, determinations contrary to the evidence, determinations contrary to Appeals Board decisions, Findings of Facts and Conclusions of Law of the administrative determination are contrary to the Order for Remand of the Appeals Board, a general inability of the Appeals Board to reverse the determinations of Hearing Examiners, and Appellees exceeding the authority of Executive Order No. 10865.

There was no showing by Department Counsel during the hearings to establish the factual allegations in support of the Statement of Reasons that adduced to poor judgment, unreliability or untrustworthiness on the part of DORFMONT. Similarly, there was no nexus or relationship established between

Criterion I and any inference drawn from the evidence that DORFMONT has failed or will fail to safeguard classified information or disclose classified information to unauthorized persons inadvertently or intentionally in the future. See McKean v. Laird (1973, 490 F2d 1262, 1263-1264 for discussion concerning nexus.

The Court in Gayer vs. Schlesinger, supra, also specifically referred to the existence of a nexus between the conduct involved in the Security Clearance. The Court in Gayer found that the applicant in Adams vs. Laird did not attempt to disprove the existence of a nexus but rather to prevent a finding that he had engaged in the alleged homosexual acts. Adams vs. Laird did not inquire into the nexus or reasonable relationship of conduct to the national security interest.

In Marks vs. Schlesinger 384 F.Supp. 1373 (1974), the Court stated that the government has the burden of offering proof of a rational nexus between alleged conduct and that person's ability to safeguard classified information.

2. **DISTRICT AND NINTH CIRCUIT COURTS HAVE MISINTERPRETED RECENT SUPREME COURT DECISION OF DEPARTMENT OF NAVY V. EGAN AS FORECLOSING JUDICIAL REVIEW OF SECURITY CLEARANCE MATTERS, WHEN JUDICIAL REVIEW WAS ORIGINALLY PERMITTED IN THE SUPREME COURT DECISION OF GREENE V. MC ELROY.**

The order of the Court dismissing the action for want of subject matter jurisdiction based on Department of Navy vs. Egan, 108 S.Ct. 818 and Hill vs. Department of Air Force, 844 F.2d 1407, is clearly erroneous and inconsistent with the decision of Greene

v. McElroy, supra, and its progeny. It would seem that the facts of DORFMONT raise the type of issues that Greene v. McElroy had before it and that the decisions of Egan and Hill are distinguishable from the facts before this Court. Both the Egan and Hill cases dealt with the issue of a federal employee being removed from federal employment under the Merit System Protection Board and whether that Board had an obligation to fully explore and conduct a Security Clearance Hearing. The Supreme Court determined that the Merit System Protection Board does not have authority to review the substance of an underlying decision to deny or revoke a Security Clearance in the course of reviewing an adverse action. Hill bases its reliance upon the Egan decision. Egan lost his job because he was not granted a Clearance. Hill lost his job

because of misconduct, conversion of telephone services, among other actions, resulting in the suspension of his Clearance. Both Hill and Egan contested the loss of employment and received full due process hearings before the Merit System Protection Board. The Court in Hill determined that the suspension of Hill's Security Clearance did not deprive him of employment or shut off other employment opportunities. The Court stated in Hill that he could upon seeking employment in the private sector agree to apply to the Defense Industrial Security Clearance for a Clearance and to receive a full hearing if denial of Clearance is proposed. The Hill and Egan cases do not deal with judicial review or Constitutional challenges based on due process violations of DOD and its Industrial Security Clearance Review Hearings. On that basis, those two cases

are distinguishible from DORFMONT. The Supreme Court in Egan specifically stated that the Merit System Protection Board is not empowered to review a Security Clearance determination, since the denial of the Security Clearance is not an adverse action that is within the jurisdiction of the Board. See page 825 of Egan, supra. Thus, the Egan and Hill cases are quite distinguishible from DORFMONT. The case decisions of McElroy, Adams and Gayer support DORFMONT'S right to judicial review of administrative agency decisions that violate her Constitutional rights.

3. **DORFMONT HAD A PROPRIETARY INTEREST IN HER EMPLOYMENT AND HER SECURITY CLEARANCE AND THE RIGHT TO REMAIN GAINFULLY EMPLOYED.**

DORFMONT claims that her constitutional rights to due process of

law were violated. Under the Fifth Amendment to the United States Constitution no person shall be deprived of life, liberty, or property without due process of law. Through the due process clause of the Fifth Amendment to the U.S. Constitution, Petitioner has a right to be gainfully employed. DORFMONT claims that the Criteria employed under Directive 5220.6, especially Criterion I, as promulgated and enforced by the DEPARTMENT and the AGENCY violated due process and has resulted in an unfair determination revoking the security clearance of DORFMONT, thereby depriving her of her liberty which is her freedom to practice her chosen profession, and her property which is DORFMONT'S employment at Hughes Aircraft Company. Such deprivation was occasioned by arbitrary and capricious standards and Criteria employed by the DEPARTMENT and

AGENCY under Directive 5220.6. DORFMONT has a legal and protected right to judicial review on the merits of the revocation of a security clearance by the DEPARTMENT and the AGENCY. Such judicial review has been conducted in the past on other security clearance cases. Greene vs. McElroy (1958), 360 U.S. 474. Furthermore, it has been held that procedural irregularities in admininstrative proceedings that are prejudicial to a party justify judicial intervention. U.S. v. Priority Products (1985), 615 F. Supp. 591, 592.

DORFMONT claims that the Administrative Hearing, employing the Criteria of Directive 5220.6 has amounted to a miscarriage of justice and has abridged her rights to substantive and procedural due process of law. Due process arises from the United States Constitution. An administrative order is

void if the hearing is denied or if the hearing which was granted was inadequate or manifestly unfair. Interstate Commerce Commission vs. Louisville and N.R. Co. (1913) 227 U.S. 88. American Power and Light Co. vs. Securities and Exchange Commission (1946) 329 U.S. 90. It has been held that appointment of an unqualified hearing officer is an irregularity which invalidates the resulting order. United States vs. L.A. Tucker Truck Lines Inc. (1952), 344 U.S. 33.

4. **JUDICIAL REVIEW IS WARRANTED FOR SECURITY CLEARANCE HEARING WHEN FEDERAL QUESTION INVOLVED.**

As mentioned above, the substantive and procedural due process violations justified judicial review. In Davis v. Passman (1979), 442 U.S. 228, the Court found that a litigant

discriminated in employment on the basis of sex by a U.S. Congressman had a cause of action and damage remedy implied directly under the Constitution by the violation of the Due Process Clause. The Court, in Davis, presumed that justiciable, constitutional rights are to be enforced through the Courts.

On facts very similar to this case, the Court, in Davis, found that a Judgment of Dismissal under F.R.C.P., Rule 12(b)(6) on the basis that the Court lacked subject matter jurisdiction under 28 U.S.C. 1331 was improper and reversed the decision of the lower court. The Court determined that the litigant's assertion of violation of the Due Process Clause of the Fifth Amendment to the Constitution would be sufficient to invoke the federal question jurisdiction of the Court. Even when a Court ascertains that a matter has been

committed to agency discretion by law, it may entertain charges that the agency's decision violated constitutional, statutory or regulatory command. Shell Oil Co. vs. Dept. of Energy(1979), 477 F. Supp. 413. Electricities of North Carolina, Inc. vs. Southeastern Power Adm.(1985), 774 F.2d 1262.

Those constitutional challenges were recognized in the Egan case. The Egan Court fortified its position by stating the Merit System Protection Board did not have within its powers to review security clearance matters. But this is where Egan is strikingly different from DORFMONT. In the DORFMONT case, the DOD, Defense Legal Services Agency, Directorate for Industrial Security Clearance Review, was empowered to review security clearance cases. The constitutional challenges raised by Petitioner arise from

procedural unfairness stemming from that hearing process.

Several cases have determined that violation of the Constitution by federal officials is sufficient to invoke the general federal question jurisdiction of the District Court. See Bivens vs.Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Butz vs. Economou, 438 U.S. 478 (1977). The Court in Butz reaffirmed the holding of Bivens which established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal question jurisdiction of the District Court to obtain an award of monetary damages against the responsible federal official. The Fifth Amendment provides that "no person shall be...deprived of life, liberty, or property, without due process of law..." In numerous decisions, the

Supreme Court has held that the due process clause of the Fifth Amendment forbids the federal government to deny equal protection of the laws. Buckley vs. Valeo, 424 U.S. 1 (1976). The due process clause confers upon the individual a federal constitutional right to be free from arbitrary and capricious administrative decisions which have a direct effect upon that individual's right to life, liberty, or property.

VI.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted.

DATED: December 5, 1990

DALE M. FIOLA
Attorney for Petitioner
DORFMONT

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDA B. DORFMONT,
Plaintiff-Appellant,

v.

JAMES P. BROWN, DIRECTOR OF DEPARTMENT OF DEFENSE, DEFENSE LEGAL SERVICES AGENCY, DIRECTORATE FOR INDUSTRIAL SECURITY CLEARANCE REVIEW; FRANK C. CARLUCCI, SECRETARY OF DEFENSE; UNITED STATES OF AMERICA,
Defendants-Appellees.

No. 88-6580
D.C. No.
CV 88-5249-WPC
OPINION

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Argued and Submitted
January 29, 1990—Pasadena, California

Filed September 10, 1990

Before: Dorothy W. Nelson, Melvin Brunetti and
Alex Kozinski, Circuit Judges.

Opinion by Judge Kozinski; Concurrence by Judge
Kozinski

SUMMARY

Constitutional Law

Affirming a judgment, the court held that a claim for denia of due process stemming from revocation of a security clear ance to do government defense work is not a colorable consti tutional claim.

Appellant Linda Dorfmont worked for a private employe at a job for which the Department of Defense had granted he a security clearance. In 1985, the Department agency charge with reviewing security clearances recommended that a hear ing be held on whether her clearance should be revoked. Th hearing was held, her clearance was revoked, and sh appealed to the Department's appeal board. The boar affirmed, and she filed a district court action, contending th decision to revoke her clearance violated her rights to proce dural and substantive due process.

[1] Federal courts lack jurisdiction to review the merits o security clearance decisions. [2] Most of Dorfmont's claim were attacks on the merits of the Department's decision an were therefore not reviewable.

[3] However, Dorfmont also claimed that limitations o the appeal board's review powers violated her right to proce dural due process. Further, she contended that the criteri used by the defendants were vague and aribitrary, depriving her of adequate notice and raising a substantive due proces claim.

[4] To invoke due process, Dorfmont had to first show tha she had a cognizable liberty or property interest in her secur ity clearance. Because of the strong presumption against issu ance or continuation of a security clearance, no one has a right to a security clearance. [5] If there is no protected inter

est in a security clearance, there is no liberty interest i employment requiring such clearance. [6] There is also n protected property interest in the clearance or in a job requi ing such clearance. [7] Since there was no entitlement to clearance, Dorfmont was not entitled to constitutional du process protection.

In a separately written concurrence, Judge Kozinsl pointed out that this case left unresolved the important cor stitutional issue as to whether courts may review securit clearance decisions of officials who derive their authorit from the President.

COUNSEL

Dale M. Fiola, Anaheim, California, for the plaintifl appellant.

Tomson T. Ong, Assistant United States Attorney, Los Ange les, California, for the defendants-appellees.

OPINION

KOZINSKI, Circuit Judge:

Linda Dorfmont lost her security clearance. We conside whether the federal courts can do anything about it.

Facts

Linda Dorfmont worked on United States governmen defense contracts for Hughes Aircraft, a job for which the Department of Defense had granted her a security clearance

In 1984, while working on one of those defense contracts Dorfmont found herself in need of a computer programmer

Unable to secure a programmer within the company, sh decided to go outside for help; far outside. On several occa sions during the summer of 1984, she sent company data t one Lubemir Peichev. A Bulgarian national, Peichev wa serving a life sentence in federal prison for his part in th attempted hijacking of an airliner. For all that, he was said t be a top-notch programmer.

The Directorate for Industrial Security Clearance Reviev DISCR), the Defense Department agency charged witl reviewing the security clearances of industrial employee working on defense contracts, discovered Dorfmont's arrangement with Peichev; it was not amused. In July 1985 t sent Dorfmont a Statement of Reasons explaining that i could not make a preliminary finding that granting Dorfmon continued access to classified material was "clearly consisten with the national interest." The Directorate also advised Dor- mont it was recommending that her case be submitted to a hearing examiner for a determination whether to revoke he security clearance. The stated reason for this recommenda- tion was "conduct of a reckless nature indicating poor judg- ment, unreliability or untrustworthiness," to wit the turning over of documents to Peichev.

Dorfmont submitted a response to the Statement of Rea- sons, and requested a formal hearing. The hearing took place before a hearing examiner on four days in September 1986. After receiving evidence and testimony from both Dorfmont and the Department of Defense, the examiner concluded that it was not clearly consistent with the national interest to con- tinue Dorfmont's security clearance.

Dorfmont appealed to the Department of Defense Appeal Board. In September 1987, the appeal board filed its determi- nation, finding error and remanding to the hearing examiner for reconsideration. Pursuant to the appeal board remand order, the examiner considered additional evidence and once again concluded that it was not clearly consistent with the

national interest to continue Dorfmont's security clearance Dorfmont appealed once more and, in July 1988, the appea board affirmed the determination of the hearing examiner.

A month later, Dorfmont filed the present action seeking a injunction against the revocation of her security clearance Dorfmont alleged that the decision of the hearing examine and appeals board violated her rights to procedural and sub stantive due process. The district court dismissed the com plaint, finding that it did not have jurisdiction to review th lifting of Dorfmont's security clearance.

Dorfmont appeals. The existence of subject matter juris diction is a question of law we review de novo. *Kruso v International Telephone & Telegraph Corp.*, 872 F2d 1416 1421 (9th Cir 1989).

Discussion

I. Judicial Review of Security Clearance Decisions

A. In *Department of the Navy v Egan*, 484 US 518 (1988) the Supreme Court held that the Merit Systems Protectio Board (MSPB) has no authority to review an executive deci sion to revoke a security clearance. The logic of that decisio precludes judicial review as well.

The Court explained in *Egan* that the normally strong pre sumption in favor of appellate review of agency decisionmak ing "runs aground when it encounters concerns of nationa security." Id at 527. In this "sensitive and inherentl discretionary" area of decisionmaking, the "authority to pro tect [security] informatio falls on the President as head o the Executive Branch and as Commander in Chief." Id.

Because of the extreme sensitivity of security matters, ther is a strong presumption against granting a security clearance Whenever any doubt is raised about an individual's judgmen

or loyalty, it is deemed best to err on the side of the govern ment's compelling interest in security by denying or revokin clearance. The general administrative standard is that a clear ance may be granted or retained only if "clearly consisten with the interests of the national security." Id at 528 (interna quotations omitted). In light of this presumption, "no one ha a 'right' to a security clearance." Id.

Security clearance decisions are inherently uncertain; they rest on the ability to predict an individual's future behavior In *Egan,* the Court recognized the necessity for expertise in making such decisions. Id at 529-30. In the key passage for our purposes, the Court concluded:

> Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

Id at 529. This reasoning applies no less to the federal courts than to the MSPB. When it comes to security matters, a federal court is "an outside nonexpert body." We have no more business reviewing the merits of a decision to grant or revoke a security clearance than does the MSPB. Thus, the reasoning behind *Egan* precludes this type of judicial review.

[1] In its subsequent decision in *Webster* v *Doe,* 486 US 592 1988), the Court confirmed that federal courts lack jurisdiction to review the merits of security clearance decisions. The Court considered the scope of judicial review available for decisions by the Director of Central Intelligence to terminate a CIA employee for security reasons. *Webster* held that such decisions were committed to the discretion of the director by law, thereby precluding judicial review pursuant to the Administrative Procedure Act. Id at 601.

The Department of Defense revoked Dorfmont's security clearance. The department derives its authority directly from the President. See Exec Order No. 10865, 25 Fed Reg 1583 (1960), as amended by Exec Order No. 10909, 26 Fed Reg 508 (1961). The decision to grant or revoke a security clearance is committed to the discretion of the President by law. *Egan*, 484 US at 527. The district court therefore cannot review the merits of the department's decision to revoke Dorfmont's security clearance. See id at 529-30; *Webster*, 486 US at 601.

[2] B. Although Dorfmont fashions her claims as due process challenges, they are, save two, attacks on the merits of the decision to lift her security clearance. She argues essentially that her actions did not justify the lifting of her clearance: that the findings of the hearing examiner were contrary to the evidence; that the examiner must have been biased because his findings were contrary to the evidence and because he chose not to believe Dorfmont's testimony; that his findings were contrary to Department of Defense Directive 5220.6 § F.3, which provides that a security clearance will be continued only if "clearly consistent with the national interest";[1] that the examiner abused his discretion in denying Dorfmont's motion to dismiss; that he abused his discretion by failing to follow the remand order of the appeal board; and that the appeal board erred and abused its discretion by affirming the determination of the examiner after reconsideration. Dorfmont also complains that the criteria defendants use to make

[1]We recognize that federal courts normally have jurisdiction over claims that a federal agency did not follow one of its own regulations. See *Service v Dulles*, 354 US 363 (1957); *Webster*, 486 US at 602 n 7. Dorfmont's claim that the examiner's determinations are contrary to section F.3 is, superficially at least, a claim of this type. Nonetheless, a federal court cannot hear this type of challenge. Section F.3 provides that a security clearance may be continued only if "clearly consistent with the national interest." Judicial review of the Defense Department's compliance with this directive would perforce involve a review on the merits of the decision to lift the security clearance. To undertake such review is to eviscerate *Egan*.

security clearance decisions do not assure a reasonable nexu between the applicant's behavior and the security objective of the United States. All of these claims are attacks on th merits of the department's decision in this case and on secur ity decisions generally; the district court has no authority t review them.

[3] Dorfmont does, however, raise two claims that do no attack the substance of the department's decision. The appea board, in affirming the determination of the hearing exam iner, explained that it has no authority to reverse a decisio of the examiner, but can only affirm or remand for furthe proceedings. Dorfmont claims that this limitation on th appeal board's review powers violates her right to procedura due process. Dorfmont also alleges that the criteria defen dants use to make security clearance decisions are vague an arbitrary and therefore do not provide adequate notice o what conduct is likely to lead to revocation of a security clear ance. Id. This is a substantive due process claim. See *Sinaloa Lake Owners Ass'n* v *City of Simi Valley*, 882 F2d 1398, 140 (9th Cir 1989) ("the due process clause includes a substantive component which guards against arbitrary and capricious government action"), cert denied, 110 S Ct 1317 (1990). We must consider whether the district court can hear these claims.

II. Due Process Attack on Security Clearance Decisions

A. *Webster* held that even though section 102(c) of the National Security Act commits security-related CIA employ ment decisions to the director's discretion, that statute does not preclude judicial review of constitutional claims. 486 US at 603. The plaintiff in *Webster* brought a host of such claims all deriving from his contention that the decision to terminate his CIA employment was related to his homosexuality. Id at 601-02. Without deciding whether such accusations present a colorable constitutional claim, the Court remanded to the district court for further proceedings. Id at 603-04 & n 8.

We took similar action in a case following *Webster*. I *Dubbs* v *CIA*, 866 F2d 1114, 1120-21 (9th Cir 1989), w affirmed the district court's ruling that it had no jurisdictio under the Administrative Procedure Act to review the CIA' denial of a security clearance, but remanded for the distric court to consider Dubbs' claims that the CIA unconstitution ally discriminated against homosexuals in making securit clearance determinations.

More recently, in *High Tech Gays* v *DISCO*, 895 F2d 56 (9th Cir 1990), we considered a class action that challenged a Department of Defense policy of conducting mandator investigations of all homosexual applicants for Secret or Top Secret security clearance. Plaintiffs alleged that this policy deprived them of their speech and associational rights under the First Amendment, and of equal protection of the laws Without addressing whether the federal courts have jurisdiction to hear these claims, we ruled in favor of defendants on the merits of the equal protection attack. Id at 570-78.[2]

B. *Webster* thus did not consider whether the plaintiff had presented a colorable constitutional claim. The Court merely held that the district court had jurisdiction over such claims and remanded for further proceedings. 486 US at 603-04 & n 3. In *Dubbs*, we held that "a blanket policy of security clearance denials to all persons who engage in homosexual conduct would give rise to a colorable equal protection claim." 866 F2d at 1119 n 8. *High Tech Gays* also held that a challenge to security clearance decisions under the equal protection component of the Fifth Amendment Due Process Clause amounts to a colorable constitutional claim. See 895 F2d at 570. None of these cases considered whether a plaintiff could state a colorable claim for denial of due process in the revocation or denial of a security clearance.

[2]We also held that plaintiffs failed to allege sufficient facts to raise a justiciable First Amendment claim. 895 F2d at 580.

[4] Dorfmont attempts to invoke due process, but the requirements of due process do not apply unless Dorfmont can first show that she has a cognizable liberty or property interest in her security clearance. See *Board of Regents* v *Roth*, 408 US 564, 571 (1972); *Coakley* v *Murphy*, 884 F2d 1218, 1220 (9th Cir 1989). *Egan* dictates that she does not. Because there is a strong presumption against the issuance or continuation of a security clearance, and because the availability of a security clearance depends on an affirmative act of discretion by the granting official, "no one has a 'right' to a security clearance." *Egan*, 484 US at 528. Where there is no right, no process is due under the Constitution. *Brady* v *Gebbie*, 859 F2d 1543, 1547-48 (9th Cir 1988); *San Bernardino Physicians' Services Medical Group, Inc.* v *County of San Bernardino*, 825 F2d 1404, 1408-09 (9th Cir 1987).

[5] Dorfmont argues that she has a protected liberty interest in her ability to practice her chosen profession, and a protected property interest in her employment at Hughes. But Dorfmont has not been deprived of the right to earn a living. She has only been denied the ability to pursue employment requiring a Defense Department security clearance. The ability to pursue such employment stands on precisely the same footing as the security clearance itself. If there is no protected interest in a security clearance, there is no liberty interest in employment requiring such clearance.

[6] There is also no protected property interest in the clearance or in a job requiring such clearance. "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source." *Roth*, 408 US at 577. In order to have a constitutionally protected property interest in a government benefit, a person "must have more that an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement to it." Id.

[7] There is no such entitlement to a security clearance. This is not like the case where one is promised continued employment "except . . . for . . . misfeasance, malfeasance, or nonfeasance in office." *Cleveland Board of Education* v *Loudermill*, 470 US 532, 538-39 (1985) (holding that such a statutory promise did create a protected property interest in continued employment). There is a presumption *against* obtaining or maintaining a security clearance. A clearance may be maintained "only . . . upon a finding that to do so is clearly consistent with the national interest." Department of Defense Directive 5220.6 § F.3 (Aug 12, 1985). There is no right to maintain a security clearance, and no entitlement to continued employment at a job that requires a security clearance. Dorfmont has not established a cognizable liberty or property interest and therefore is not entitled to constitutional due process protection. See *Hill* v *Department of Air Force*, 844 F2d 1407, 1411 (10th Cir 1988).

Dorfmont mistakenly relies on *Greene* v *McElroy*, 360 US 74 (1959). In *Greene* the Court held that the Army could not, absent authorization from statute or the President, deprive petitioner of civilian employment by revoking his security clearance without first giving him an opportunity to examine evidence and confront witnesses against him. Id at 508. The decision led directly to the Executive Order and Department of Defense Directive defining the procedures under which the Department lifted Dorfmont's security clearance.

Greene does not help Dorfmont. Although the case appears superficially to allow a due process attack on a security clearance decision, it in fact does not. The Court stated explicitly that it was not deciding what procedures were constitutionally compelled, but only that petitioner could not be deprived of certain procedures in the absence of authorization from the President or Congress. Id. ("[T]raditional forms of fair procedure [should] not be restricted by implication or without the most explicit action by the Nations' lawmakers, even in areas

where it is possible that the Constitution presents n inhibition.").

The Army contended that there was no protected liberty o property interest:

> Although the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment, respondents contend that the admitted interferences which have occurred are indirect by-products of necessary governmental action to protect the integrity of secret information and hence are not unreasonable and do not constitute deprivations within the meaning of the Amendment.

Id at 492 (citations omitted). The Court declined to address this claim, ruling instead on the narrower ground of "authorization." Id at 493. In light of *Egan*, and for the reasons stated above, we believe that the Army's position is meritorious.

Our holding is also consistent with *Webster*, *Dubbs* and *High Tech Gays*. Those cases, to the extent they are relevant, stand for the proposition that federal courts may entertain colorable constitutional challenges to security clearance decisions. We hold only that a claim for denial of due process stemming from the revocation of a security clearance is not a colorable constitutional claim.

Conclusion

The district court does not have jurisdiction to hear attacks on the merits of security clearance decisions. We do not today decide if the court may hear constitutional attacks on these decisions, or the precise contours of such claims if allowed.

We hold only that Linda Dorfmont cannot bring colorabl constitutional claims for denial of due process. These are th only constitutional claims she presents. The district court wa correct in concluding that it could not hear them.

AFFIRMED.

KOZINSKI, Circuit Judge, concurring:

This area of the law is marked by subtle concepts and fin distinctions, it also implicates fundamental principles of sep aration of powers, national security and individual rights What a court does not decide can sometimes be as impor tant—but far more difficult to divine—than what it doe decide. I write separately to emphasize that an importan constitutional question, unanswered by prior case law, i again left open.

The Director of Central Intelligence derives his discretion ary authority over security-related employment decision from an Act of Congress, section 102(c) of the National Secur ity Act. See *Webster*, 486 US at 594, 601. *Webster*'s ruling that courts may review constitutional challenges to such deci sions was a matter of statutory construction, not constitu tional interpretation.

In contrast, the present defendants and the defendant in *Egan* (the Department of Navy), derive their authority over security decisions by delegation from the President. Under the Constitution, the President has unreviewable discretion over security decisions made pursuant to his powers as chief executive and Commander-in-Chief. *Egan*, 484 US at 527. The *Egan* Court did not address whether there can be judicia review of constitutional attacks on such decisions. Had i done so, it would have faced a question of constitutiona dimensions, a question very different from that addressed in

Webster.[1] See *Egan*, 484 US at 527 ("[The President's authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power . . . and exists quite apart from any explicit congressional grant.").

Does the Constitution preclude such review? The answer to this question may not be the same as the answer to the similar question of statutory construction resolved in *Webster*, as the Constitution erects barriers to judicial review that even Congress may not override. See *Marbury* v *Madison*, 5 US 137, 170-71 (1803) ("Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation."); *Baker* v *Carr*, 369 US 186, 217 (1962) (judicial review precluded where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department.").

Neither our earlier decision in *High Tech Gays* nor our opinion today purports to answer the difficult preliminary question whether courts may review the security clearance decisions of officials who derive their authority from the President. In *High Tech Gays*, we reached the merits of constitutional claims against such officials. However, defendants never raised, and we never considered, whether federal courts could hear the claims in the first place. Similarly, the parties before us today failed to join issue on this momentous separation-of-powers question. A constitutional analysis of the distinction between sources of authority in security clearance matters is best deferred when there are more obvious

[1]It may be that the Director of Central Intelligence derives his discretionary authority from the President as well as from statute. The Court did not analyze the problem this way in *Webster*, that case therefore does not address the reviewability of executive security decisions made pursuant to the Constitution.

ways of resolving the dispute.[2] Yet, in an appropriate case, i
s a distinction that may well make a difference.

[2]That the court has addressed the merits of a case does not preclude a subsequent determination that the case was nonreviewable. For example, n *United States* v *Borrayo*, 898 F.2d 91 (9th Cir. 1989), without addressing he jurisdictional issue, we rejected on the merits a criminal defendant's laim that the district court erred by failing to depart downward from the rescribed Sentencing Guideline range. Subsequently, in *United States* v *Morales*, 898 F.2d 99 (9th Cir. 1990), we held that we lacked jurisdiction o review sentences for failure to depart downward.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

LINDA B. DORFMONT, Plaintiff, vs. JAMES P. BROWN, DIRECTOR OF DEPARTMENT OF DEFENSE, DEFENSE LEGAL SERVICES, AGENCY, DIRECTORATE FOR INDUSTRIAL SECURITY CLEARANCE REVIEW, FRANK C. CARLUCCI, SECRETARY OF DEFENSE, UNITED STATES OF AMERICA, Defendants.	No. CV 88-5249-WPG JUDGMENT

This case came on for hearing before the Honorable William P. Gray, United

States District Judge, presiding, and the issue of subject matter jurisdiction over the action having been considered,

IT IS HEREBY ORDERED AND ADJUDGED,

That this Court does not have jurisdiction to review the lifting of the security clearance, and therefore, the Court refrains from making such review to determine whether there had been an abuse of discretion. Department of Navy v. Egan, _____ U.S. _____, 108 S.Ct. 818, 98 L.Ed 2d 918 (1988); Hill v. Department of Air Force, 844 F.2d 1407 (10th Cir. 1988).

DATED: This 26th day of September, 1988.

UNITED STATES DISTRICT COURT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

LINDA B. DORFMONT,

Petitioner,

vs.

JAMES P. BROWN, Director of Department of Defense, DEFENSE LEGAL SERVICES AGENCY, DIRECTORATE FOR INDUSTRIAL SECURITY CLEARANCE REVIEW, FRANK C. CARLUCCI, Secretary of Defense, UNITED STATES OF AMERICA,

Respondents.

CERTIFICATE OF SERVICE

The undersigned, BRENDA SCHLUTER, of the Law Offices of DALE M. FIOLA, the Attorney for Peitioner, LINDA DORFMONT, hereby certifies that on the 6th day of December, 1990, she served the foregoing Petition for Writ of Certiorari on all the parties hereto, by mailing three copies by ordinary mail, postage pre-paid, addressed as follows:

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No. 90-921

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In the Supreme Court of the United States

OCTOBER TERM, 1990

LINDA B. DORFMONT, PETITIONER

v.

JAMES P. BROWN, DIRECTOR,
DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the revocation of petitioner's security clearance is subject to judicial review.

2. Whether petitioner has a liberty or property interest in retaining a security clearance.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 913 F.2d 1399. The judgment of the district court (Pet. App. A17-A18) is unreported. The administrative decisions at issue (Pet. App. B) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1990. The petition for writ of certiorari was filed on December 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed as a systems engineer in the Radar Systems Group at Hughes Aircraft Company, a government defense contractor. In connection with her employment, she held a security clearance issued by the Department of Defense. During 1983, petitioner met and became friends with Lubemir Peichev, a Bulgarian national who was serving a life sentence in the Terminal Island Federal Correction Institution for his part in an attempted airline hijacking for ransom. Pet. App. B4-B5.

During the spring of 1984, Hughes gave petitioner the responsibility to process data as part of a program to predict failure rates of radar system components produced by Hughes. Completion of the project required proficiency in the fortran computer language. Petitioner was not a qualified fortran programer, and was unable to arrange for assistance from Hughes employees or from qualified outside sources. Petitioner then turned to Peichev, who had acquired degrees in business administration and computer science while in prison. Petitioner asked Peichev to assist her in translating Hughes' information into fortran. Peichev agreed, and petitioner mailed three packets of company data to Peichev at his prison. Prison officials, however, intercepted two of three packets and advised Hughes. An internal investigation ensued, and petitioner was disciplined for violating company rules regarding the dissemination of company information. Pet. App. B5-B7.

2. On July 24, 1985, the Department of Defense's Directorate for Industrial Security Clearance Review (DISCR) issued petitioner a Statement of Reasons stating that it could not make the preliminary finding that it was "clearly consistent with the national interest" to continue her security clearance. Pet. App. B1, citing Department of Defense (DoD) Directive 5220.6; see 32 C.F.R. 155.7. The Statement

of Reasons alleged that petitioner had engaged in "conduct of a reckless nature indicating poor judgment, unreliability or untrustworthiness as to suggest that [petitioner] might fail to safeguard classified information," and, in particular, that petitioner had provided to Peichev "company sensitive defense contract data." The Statement recommended referral to a Hearing Examiner to determine whether her security clearance should be revoked.[1] Pet. App. B1-B2, B17.

Following a four-day hearing, the Hearing Examiner concluded that petitioner had disclosed company sensitive information that, although not officially classified, nevertheless "was of potential use in defense contracts involving Hughes and the Federal Government." The Examiner rejected petitioner's claim that she had permission to disclose the data to Peichev, finding that she had not fully informed her supervisor of that decision and that it was "inherently unreasonable and unsound" to release information into a "prison environment where the potential for abuse of these materials by others was virtually unlimited." In light of those findings, the Examiner concluded that petitioner had used "appallingly poor judgment" in sending company information to Peichev, and he noted that "[t]he nation's security can not be entrusted to those who exercise poor judgment regarding the use and dissemination of information within their possession." The Examiner also concluded that petitioner's lapse could not be explained as an isolated incident, nor was its seriousness offset by mitigating factors. Finally, the Examiner pointed out that petitioner's "protracted

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[1] The Statement of Reasons also charged petitioner with a stated intent to develop a "closer relationship" with Peichev. Pet. App. B2. The Hearing Examiner found that the facts supported that charge, but that, since no relationship had developed, it was without security significance. *Id.* at B14. The Department of Defense Appeal Board agreed. *Id.* at B19.

reluctance to admit poor judgment" indicated that she was not rehabilitated. Accordingly, he concluded that "it is not clearly consistent with the national interest to grant or continue a security clearance" to petitioner. Pet. App. B2, B13-B16.

Petitioner appealed to the Department of Defense Appeal Board, which concluded that the Hearing Examiner had erred in excluding certain evidence and in failing to give an adequate explanation for certain credibility determinations. The Appeal Board remanded to the Hearing Examiner for reconsideration. Pet. App. B17-B24. On reconsideration, the Examiner considered the previously excluded evidence and gave detailed explanations for his credibility determinations. Reviewing the entire record, the Examiner reaffirmed his original conclusion that petitioner's security clearance was not clearly consistent with the national interest. *Id.* at B25-B37. The Appeal Board affirmed that determination, finding that it was supported by the evidence and reflected a correct application of the controlling principles. *Id.* at B41-B49.

3. Petitioner then filed suit in the United States District Court for the Central District of California seeking an injunction against the revocation of her security clearance. She alleged that she had been denied due process in that her conduct did not warrant revocation; the Examiner's findings were contrary to the evidence; the Examiner must have been biased because he disbelieved petitioner; his conclusions were contrary to DoD Directive 5220.6; the Examiner and the Appeal Board had abused their discretion; and the criteria for revocation had no reasonable nexus to security objectives. She also alleged that she was denied due process because the Appeal Board lacked authority to reverse the Examiner s decision (as opposed to remanding for further consideration), and because the criteria governing the revocation were vague and arbitrary. Pet. App. A7-A8. The

district court dismissed the case, stating that it had no jurisdiction to review security clearance determinations. *Id.* at A17-A18.

4. The court of appeals affirmed. As an initial matter, the court noted that because "[t]he decision to grant or revoke a security clearance is committed to the discretion of the President by law," the courts "cannot review the merits of the [Defense] [D]epartment's decision to revoke [petitioner's] security clearance." Pet. App. A7. Although petitioner purported to challenge her revocation on due process grounds, the court characterized most of petitioner's claims as attacks on the merits of the revocation decision. Those contentions, the court explained, could not be reviewed by the judiciary. Pet. App. A6-A8, citing *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), and *Webster* v. *Doe*, 486 U.S. 592 (1988).

The court acknowledged, however, that petitioner's challenge to the limitations on the authority of the Appeal Board, and her claim that the security-clearance criteria were vague and arbitrary, were properly analyzed as due process claims. Pet. App. A8. Noting that *Webster* v. *Doe*, 486 U.S. at 603-604, had recognized that there may be some judicial review of "colorable" constitutional claims, the court went on to examine whether petitioner's claims rose to the level of being colorable. It concluded that petitioner's due process claims were not colorable because she had no protected liberty or property interest in retaining a security clearance. Pet. App. A10. Because no protected liberty or property interest was implicated by the revocation determination, the court concluded that petitioner's due process claims had been properly dismissed. *Id.* at A12-A13.

ARGUMENT

1. Petitioner renews her contention (Pet. 32-54) that she is entitled to judicial review of the merits of the revocation

of her security clearance. She urges a potpourri of objections to the Department of Defense's underlying decision, including that it was arbitrary, produced by bias, contrary to the evidence, and unsupported by a showing that petitioner has or will fail to safeguard classified information. Pet. 48-50. The court of appeals correctly rejected her invitation to engage in substantive review of the grounds on which her clearance was revoked.[2]

Although there is ordinarily a presumption favoring review of administrative claims, this Court has recognized that the presumption of review "runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988); see *Webster* v. *Doe*, 486 U.S. 592, 599-600 (1988); *United States Information Agency* v. *Krc*, 905 F.2d 389, 396 (D.C. Cir. 1990). As the Court explained in *Egan*:

> [T]he protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor

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[2] Petitioner continues to characterize these objections as due process claims. But the court of appeals correctly analyzed them, for the most part, as asserting routine administrative objections to the merits of DISCR's decision. Indeed, petitioner inadvertently reveals that point herself through her heavy reliance (Pet. 37-38) on standards drawn from the Administrative Procedure Act (APA).

> can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

484 U.S. at 529. In *Egan*, those considerations prompted the Court to hold that the Merit Systems Protection Board (MSPB) lacks authority to review the substance of a revocation or denial of a security clearance in the course of reviewing an adverse personnel action. Those considerations apply with equal force to the federal courts, whose authority to review agency action does not extend to security matters that are entrusted to the agency's discretion. See 5 U.S.C. 701(a)(2) (APA review provisions apply "except to the extent that * * * agency action is committed to agency discretion by law"); *Webster* v. *Doe*, *supra* (decision by the CIA to terminate an employee for security reasons is not reviewable under the APA).[3]

As the court of appeals explained, "[w]hen it comes to security matters, a federal court is 'an outside nonexpert body'" that has "no more business reviewing the merits of a decision to grant or revoke a security clearance than does the MSPB." Pet. App. A6. See also *Hill* v. *Department of the Air Force*, 844 F.2d 1407, 1411-1412 (10th Cir.), cert. denied, 488 U.S. 825 (1988). Petitioner seeks (Pet. 51-54) to distinguish *Egan* and *Hill* on the ground that those cases involved federal employees whose challenges to the revocations of their security clearances were not within the jurisdic-

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[3] The Court in *Webster* noted that a claim that an agency failed to comply with its own regulations is ordinarily reviewable under the APA. 486 U.S. at 602 n.7. But the court of appeals properly concluded that petitioner's attempt to fit her case into that mold was unsuccessful. Pet. App. A7 n.1. The regulation that petitioner contended had been breached by the agency was the provision that a security clearance may be continued only if it is "clearly consistent with the national interest." To permit review of a claim that the agency's decision did not square with that requirement would necessarily inject the courts into wholesale review of the merits of the clearance decision.

tion of the MSPB. But *Egan*'s rationale and the traditional limitations on judicial review reflected in the APA foreclose such a distinction. The security-clearance standards for contractor employees and for federal government employees are the same: the agency must be able to make an affirmative determination that access to classified information is "clearly consistent with the national interest." See Exec. Order No. 10,865, § 2, 3 C.F.R. 398, 399 (1959-1963 Comp.) (industrial employees); Exec. Order No. 10,450, §§ 2 and 7, 3 C.F.R. 936, 938 (1949-1953 Comp.) (general standard for federal employees); 32 C.F.R. 155.4 (industrial employees and certain others); 32 C.F.R. 156.3(a) (Department of Defense).

An essential ingredient in that standard, regardless of the status of the person to whom it is applied, is that the agency must exercise judgment and discretion based on a familiarity with the Nation's security requirements and with the level of confidence that is needed to justify entrusting an individual with national secrets. Neither courts nor administrative bodies like the MSPB have the authority to review those determinations. See *Hill*, 844 F.2d at 1411-1412; see also *United States Information Agency* v. *Krc*, 905 F.2d at 395 (analogizing agency decision to withdraw clearance for overseas postings to the Navy's decision in *Egan*). Indeed, the Court in *Egan* bolstered its holding by referring to the principle that "unless Congress specifically has provided otherwise, *courts* traditionally have been reluctant to intrude upon the authority of the Executive [Branch] in military and national security affairs." 484 U.S. at 530 (emphasis added).

In some pre-*Egan* cases, the courts did review the merits of clearance revocations or denials. See *e.g.*, *Gayer* v. *Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973); *McKeand* v. *Laird*, 490 F.2d 1262 (9th Cir. 1973); see also *Adams* v. *Laird*, 420 F.2d 230 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970). But there is no indication that the D.C.

Circuit would undertake such review today, see *Krc*, 905 F.2d at 395 & n.4. And the decision below demonstrates that *McKeand* is no longer good law in the Ninth Circuit. Pet. App. A6.[4]

2. Petitioner also contends (Pet. 54-57) that she has a right to judicial review on her alleged due process claims because she has a liberty interest in pursuing her chosen profession, and a property interest in her employment at Hughes. Those contentions do not merit this Court's review. The court of appeals stated that *colorable* due process claims stand on a different footing from routine challenges to the merits of a security-clearance revocation. But it correctly held that petitioner does not have even a colorable claim that she was denied a protected liberty or property interest by the agency decision she challenges.[5] Pet. App. A8-A12.

In *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), the Court explained that the requirements of due process do not apply unless government action implicates a protected liberty or property interest. Petitioner, however, can identify no liberty interest in her desire "to practice her

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[4] Petitioner's reliance (Pet. 34) on *Greene* v. *McElroy*, 360 U.S. 474 (1959), is also misplaced; that case held only that there was neither congressional nor presidential authorization for the industrial security clearance program involved in that case, which permitted revocations of clearances without confrontation and cross-examination of adverse witnesses. The Court did not review the *merits* of the security-clearance decision.

[5] Because the court of appeals reviewed petitioner's constitutional claims, but determined that she had not satisfied the threshold requirement for invoking due process, this case is entirely consistent with decisions cited by petitioner as examples of judicial enforcement of constitutional claims. Pet. 57-61, citing *Davis* v. *Passman*, 442 U.S. 228 (1979), *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and *Butz* v. *Economou*, 438 U.S. 478 (1978).

chosen profession" that is infringed by the decision at issue. The DoD's denial of a clearance does not foreclose her from employment in her profession; it merely restricts her from employment requiring a security clearance. "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains free as before to seek another." *Roth*, 408 U.S. at 575. Nor, for the same reasons, does the DoD's revocation of her security clearance impinge on any protected property interest with respect to petitioner's employment at Hughes. See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961) (government's denial of access to an employee who worked for a private contractor in a government weapons plant because she failed to meet plant security requirements did not trigger due process protections).

The essential fallacy of petitioner's position is her assumption that her desire for a security clearance is entitled to constitutional protection. But "no one has a 'right' to a security clearance." *Egan*, 484 U.S. at 528. Rather, "[t]he grant of a clearance requires an affirmative act of discretion on the part of the granting official." *Ibid.* Petitioner seeks to sidestep that obstacle by claiming that her desire to pursue her profession and continue employment at Hughes constitute the requisite protected interests; she then contends those interests justify applying the requirements of due process to the underlying government decision on her clearance. If that contention were accepted, it would nullify the principle that a person has no right to a security clearance in the first place. The security-clearance process invariably affects employment opportunities. Petitioner's position would permit private employment arrangements to create constitutionally protected rights with respect to any position requiring a clearance, thus triggering the full panoply of due process protections for the government's security-clearance decisions. That result is incompatible with the constitutional and

prudential considerations that led the Court to recognize that the grant or denial of a security clearance lies within Executive Branch discretion, and is not a matter of private right. *Egan*, 484 U.S. at 529-530.

Greene v. *McElroy* does not require otherwise. There, the Court stated that "the right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment," but the Court was careful to reserve the question whether any incidental interference with an individual's particular employment as a by-product of regulating security clearances is reasonable, such that it "do[es] not constitute [a] deprivation[]" under the Fifth Amendment. 360 U.S. at 492. In *Cafeteria Workers* v. *McElroy*, the Court recognized that *Greene* "did not reach the constitutional issues which that case otherwise would have presented," and went on to hold that due process protections did not attach to the denial of access to a military facility because of security concerns, even though a person's private employment on the facility was affected. 367 U.S. at 889-890, 896-899. Although the Court in *Cafeteria Workers* did not sharply distinguish between the issue whether a protected interest was at stake and the analysis of what process was due, its ultimate holding requires the rejection of petitioner's reliance on her private employment as a basis for applying due process constraints to security clearance decisions.[6]

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[6] Even if petitioner had a protected interest, her due process claims, as identified by the court of appeals (Pet. App. A8), are without merit. Limitations on the Appeal Board's authority to review the hearing examiner's decision, see 32 C.F.R. 155.7(t), do not violate procedural due process. Even for criminal defendants, appellate review is not required, see *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956); there is no requirement for plenary agency appeals of administrative determinations. Petitioner fares no better in arguing (Pet. 25, 49) that the criteria used to make the

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1991

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decision on her clearance were unduly vague. Broad latitude must be accorded to the Executive in framing standards to determine whether a person might compromise the security of sensitive information; petitioner, after all, is not being sent to jail. Cf. *Adams* v. *Laird*, 420 F.2d at 239. Moreover, petitioner's clearance was revoked because she took actions "that indicate poor judgment, unreliability, or untrustworthiness." Pet. App. B3; 32 C.F.R. 155.6(e)(9). Whatever ambiguity there may be at the margins, petitioner's transmission of company sensitive data relating to a defense project to a Bulgarian national serving a life sentence for his role in a hijacking seems to fall comfortably within that standard.

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